

DECISION MEMORANDUM

TO: COMMISSIONER KEMPTON
COMMISSIONER SMITH
COMMISSIONER REDFORD
COMMISSION SECRETARY
COMMISSION STAFF

FROM: DON HOWELL
DEPUTY ATTORNEY GENERAL

DATE: MARCH 24, 2010

SUBJECT: INTERMOUNTAIN GAS COMPANY'S PETITION FOR
DECLARATORY ORDER, CASE NO. INT-G-10-01

On March 4, 2010, Intermountain Gas (a subsidiary of MDU Resources Group) filed a Petition seeking a declaratory order from the Commission. More specifically, the utility seeks an order from the Commission stating that the Commission lacks "economic jurisdiction of the resale of natural gas by third party non-utilities for use in motor vehicles." Application at 1, 2. Intermountain requests that its Petition be process under Modified Procedure. *Id.* at 4.

BACKGROUND

Intermountain Gas states that it has been approached by third party non-utility organizations requesting that Intermountain sell natural gas to them "for their resale for use in motor vehicles for transportation purposes." *Id.* at 3. For example, Intermountain envisions that non-utility third parties would "compress" natural gas (CNG) and resell the CNG to other persons as fuel for their motor vehicles. The Company maintains that fleets of heavy duty vehicles appear to be the largest growing segment of the CNG market. "Currently, there are a number of western states that permit public CNG fueling stations including, but not limited to, California, Washington, Utah and Wyoming." *Id.* Intermountain believes that there are economic and environmental benefits for its customers and the State by encouraging the use of CNG as a transportation fuel. *Id.*

LEGAL SUPPORT FOR THE PETITION

In its Petition, Intermountain Gas states that it is not aware of any Idaho Court decision which has addressed the resale of natural gas as a transportation fuel. The Company

maintains that Idaho statutory law (*Idaho Code* §§ 61-116, 61-117, 61-129) does not specifically address the resale of natural gas. Application at 3. The Idaho statutes referenced by Intermountain Gas in its Petition are set out below.

61-116. GAS PLANT. The term “gas plant” when used in this act includes all real estate, fixtures and personal property owned, controlled, operated or managed in connection with or to facilitate the production, generation, transmission, delivery or furnishing of gas (natural or manufactured) for light, heat or power.

61-117. GAS CORPORATION. The term “gas corporation” when used in this act includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any gas plant for compensation, within this state, except where gas is made or produced on and distributed by the maker or producer through private property alone solely for his own use or the use of his tenants and not for sale to others.

61-129. PUBLIC UTILITY. The term “public utility” when used in this act includes every common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, water corporation, and wharfinger, as those terms are defined in this chapter and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this act: provided, that the term “public utility” as used in this act shall cover cases both where the service is performed and the commodity delivered directly to the public or some portion thereof, and where the service is performed or the commodity delivered to any corporation or corporations, or any person or persons, who in turn, either directly or indirectly or mediately or immediately, performs the services or delivers such commodity to or for the public or some portion thereof.

The Company did point to one Idaho Commission case and one California PUC case to support its Petition. In Order No. 26514, the Commission found that Idaho Power’s leasing of “dark” optic-fiber cable was not the provision of a public utility service as defined by Title 62.¹ Case No. IPC-E-96-9. In the California case, the California PUC ruled that persons operating service stations for the resale of the compressed natural gas for vehicle use, other than those who are public utilities, are not subject to rate regulation by the California Commission. *In Re Pacific Gas and Electric Company*, 124 PUR 4th 107 at pp. 125, 126 (1991).

¹ The term “dark fiber” normally refers to installed fiber optic cable that is not electronically activated for the transmission of information. In Order No. 26514, the Commission found that leasing Idaho Power dark fiber to Albertson’s and the City of Boise does not constitute a “telecommunications service” as defined by *Idaho Code* § 62-603([13]).

The utility also noted that Section 404 of the Energy Policy Act of 1992 may restrict the Commission's jurisdiction over the resale of natural gas. In particular, Section 404(b) provides

The transportation or sale of natural gas by any person who is not otherwise a public utility, within the meaning of State law, . . . to any person for use by such person as a fuel in a self-propelled vehicle, shall not be considered to be transportation or sale of natural gas within the meaning of any State law, regulation or order in effect before January 1, 1989. This subsection shall not apply to any provision of State law . . . to the extent that such provision has as its primary purpose the protection of public safety.

Application at 4, *citing* 15 U.S.C. § 717. Intermountain asserted that *Idaho Code* §§ 61-116, 61-117, and 61-129 were all enacted before January 1, 1989. As part of its declaratory order, Intermountain asks that the Commission continue to regulate the safety of natural gas facilities operated by Intermountain, but only to point where Intermountain's facilities connect to the customer's metering device. *Id.* at 4.

Intermountain does not envision any changes in its existing rate tariffs. If its Petition is granted, Intermountain proposes to sell natural gas to resellers utilizing its existing tariffs.

Intermountain states that it has brought the Petition to the attention of persons who have expressed an interest in reselling natural gas and to those parties regularly intervening in Intermountain Gas cases. The service list accompanying the Petition indicates that the Petition was served on nine persons or entities. Although the Petition indicates that it has been brought to the attention of all affected utilities, the service list does not indicate that Avista was served with a copy of the Petition.

STAFF RECOMMENDATION

Staff recommends that the Petition for Declaratory Order be processed under Modified Procedure. Staff further recommends that Notice of Petition be served upon Avista and the other persons listed in Intermountain's Certificate of Service. Given the press of other business, Staff recommends that a 28-day comment period be used in this case.

COMMISSION DECISION

Does the Commission wish to process this Petition for a Declaratory Order under Modified Procedure with a 28-day comment period?

A handwritten signature in black ink, appearing to read "Don", is positioned above a horizontal line.

Don Howell
Deputy Attorney General

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